

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Original & affidavit of mailing

77-1416

To be argued by
JEFFREY H. KAY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1416

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL A. GIANNONE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

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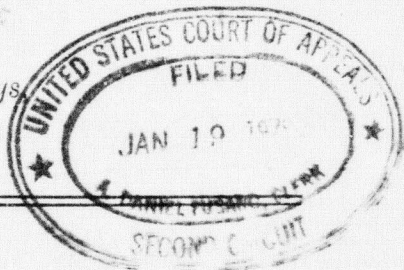




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UNITED STATES OF AMERICA,

Appellee,

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MICHAEL A. GIANNONE,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Michael Giannone appeals from a judgment of the United States District Court for the Eastern District of New York (Bramwell, J.), entered on March 11, 1977, convicting him upon his plea of guilty to an indictment charging him with two counts of bank robbery, in violation of 18 U.S.C. § 2113(a). Giannone was sentenced to two concurrent terms of ten years' imprisonment and is currently incarcerated pursuant to this judgment.

On appeal, Giannone contends that the district court failed to individualize his sentence and relied instead on a uniform policy of imposing a fixed prison term for bank robbery. Accordingly, Giannone urges that the case should be remanded and that he should be re-sentenced by another district judge.

Statement of the Case

By indictment filed in the Eastern District of New York on November 19, 1976, Michael Giannone was charged with two counts of bank robbery, in violation of 18 U.S.C. § 2113(a). Specifically, it was alleged that defendant and one George O'Connor robbed the Citibank, 60-10 Queens Boulevard, Queens, New York of \$4061 on August 10, 1976, and the European American Bank, 35-01 Northern Boulevard, Queens, New York of \$4500 on November 3, 1976.

On January 20, 1977, Giannone entered a plea of guilty to both counts of the indictment (P. 6).¹ Before accepting the plea, Judge Bramwell advised Giannone of his constitutional rights and asked Giannone several questions about the voluntariness of his desire to plead guilty. Giannone told the court that no promises had been made as to sentence. Judge Bramwell specifically informed Giannone that the maximum sentence he faced was 20 years and a fine of \$10,000 on each count, and Giannone acknowledged this fact. At the conclusion of the court's questioning, Judge Bramwell accepted the plea (P. 12-13).

On March 11, 1977, Giannone was sentenced by Judge Bramwell to concurrent terms of ten years' imprisonment on both counts of the indictment. The court further recommended to the Bureau of Prisons that the defendant receive treatment for his drug addiction (S. 9).

Immediately following the sentencing on March 11, 1977, Giannone's counsel asked the court for a reduction of sentence in light of Giannone's age and drug addiction (S. 9-10). The court declined to reduce the sentence (S. 13).

¹ References preceded by "P" and "S" refer to pages of the minutes of the plea and sentencing proceedings respectively.

ARGUMENT

The sentencing court did take individual factors into consideration in determining Giannone's sentence.

Giannone contends that the district court failed to contemplate the "unique circumstances presented by his case" in determining what penalty to impose. Specifically, defendant argues that the facts and statements developed at the sentencing proceeding indicate that the court used a uniform sentencing policy in considering his sentence. Therefore, Giannone urges that the sentence imposed by Judge Bramwell may not stand and that the case should be remanded to another district judge for resentencing. We submit that Giannone's sentence was well within the statutory limits and that the district court did take into account individual factors before pronouncing judgment on defendant.

The record of the sentencing proceeding makes plain that Judge Bramwell was fully informed of the facts and circumstances concerning Giannone's background and his history of addiction to narcotics. In addition to studying the pre-sentence report and hearing argument of counsel, the court acknowledged having received and considered several letters from defendant's father and other friends, detailing Giannone's personal history. Indeed, before imposing sentence, Judge Bramwell advised defendant that he was going to recommend to the Bureau of Prisons that Giannone receive treatment for drug addiction because the court believed he needed special medical attention (S. 6). Thus, Judge Bramwell was cognizant of Giannone's past use and dependence on drugs before he imposed sentence.

Judge Bramwell further indicated that he was aware of Giannone's four prior convictions, three of which were

related to drug addiction. In addition, the court noted that Giannone and a co-defendant had robbed eight banks of \$36,000, which money had not been recovered (S. 9).² Judge Bramwell pointed out to counsel that the sentence imposed took into account the severity of the crime committed and emphasized that he had "weighed and balanced what the father said and what [Giannone's] mistakes were which created this problem...and that this is the sentence I will give for this particular defendant" (S. 12-3).

Hence, the record makes clear that the court's sentence was not a fixed and mechanical application of a uniform rule for sentencing bank robbers.³ Judge Bramwell's expressed concern for Giannone's drug addiction and the severity of the crime of bank robbery led him to the belief that a period of incarceration of ten years was warranted in order to further Giannone's rehabilitation (S. 14). Therefore, the sentence imposed did not constitute an abuse of discretion by the district court in this case.

The cases cited by Giannone, *United States v. Negron*, 548 F.2d 1085, 1087 (2d Cir. 1977); *United States v. Schwartz*, 500 F.2d 1350, 1352 (2d Cir. 1974); *United States v. Baker*, 487 F.2d 360, 361 (2d Cir. 1973), deal with instances where the district court had denied the benefits of the Youth Correction Act, 18 U.S.C. § 5010, to the defendant. The instant record does not present

² This information is contained in Giannone's pre-sentence report. We are transmitting copies of the report to the Court for distribution to each member of the panel hearing the case.

³ Defendant's brief quotes several statements of Judge Bramwell out of context and not in the framework of the colloquy between counsel and the court. Nowhere does Judge Bramwell indicate that he is invoking a fixed sentencing policy or uniform sentencing to cover this kind of crime, although the court does point out that this type of defendant, meaning drug addicted bank robbers, will generally receive comparable sentences. However, in using the term "same type of sentencing", the court was clearly not saying that it was its custom or habit to sentence *all* bank robbers to ten years' incarceration.

an issue with respect to the Youth Correction Act, as Giannone was already 26 years old at the time of the plea on January 20, 1977. While the above-cited cases also criticize the practice of following a fixed sentencing policy, they are inapplicable to the facts of this case because the record makes clear that Judge Bramwell did not apply a uniform standard in pronouncing sentence on Giannone. In *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976), *rehearing denied*, 553 F.2d 8 (1977), this Court found a sentence imposed illegal if based on false information in a pre-sentence report about the defendant. There is nothing in the sentencing minutes that shows Judge Bramwell was acting under false information provided to the court or that any misinformation was used by the court in determining what the sentence should be in this case. To the contrary, the record indicates Judge Bramwell knew a lot about Giannone by the time of sentencing: The court had been apprised of Giannone's childhood problem with his father, his drug addiction, his four prior convictions, and his involvement in eight bank robberies. Therefore an individualized approach was utilized by Judge Bramwell as he weighed the drug addiction problem and the severity of the crimes committed in determining the sentence to be imposed.

Moreover, it should be emphasized that there is no defect or any indication of an abuse of discretion as to the sentence chosen. This Court has consistently and repeatedly stated that it will not disturb on appeal a sentence, such as the one here, which is within statutory limits. *United States v. Robin*, *supra*; *United States v. Stein*, 544 F.2d 96, 101 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976).

Giannone's remaining argument concerning the drug rehabilitation facility at the United States Penitentiary at Terre Haute, Indiana is frivolous. It clearly was within the discretion of the court to recommend to the Bureau of Prisons that the defendant receive drug rehabilitation but not recommend to what facility Gian-

none be sent. The sentencing judge commits the prisoner to the custody of the Attorney General and it is exclusively for that officer to designate the place of confinement of the prisoner pursuant to 18 U.S.C. § 4082. The sentencing court may recommend a particular institution, but the Attorney General is not required to follow such a recommendation. Thus, the fact that the district court did not elect to send the appellant to the Federal Correctional Institution at Lexington, Kentucky was not an abuse of discretion and was well within the court's power. In fact, the statutory scheme which forms the basis of federal sentencing and confinement authority permits a trial judge no power to control place or conditions of confinement. *United States v. Huss*, 520 F.2d 598, 602 (2d Cir. 1975).

Accordingly, because the actions of the district court were well within its discretion and because Judge Bramwell properly imposed an individualized sentence on Giannone, the judgment of conviction and sentence should be affirmed by this Court.

CONCLUSION

The judgment of conviction and sentence should be affirmed.

Dated: Brooklyn, New York
January 16, 1978

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Barbara Allen

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 19th day of January 1978 he served a copy of the within
B rief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:
Steve L. Barrett, Esq. LAS, 509 U. S. Courthouse, Foley Square
New York, New York 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute
drop for mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
of Kings, City of New York.

Barbara Allen

Sworn to before me this

19 day of January 1978

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1979

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